

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: A135/2013

In the matter between:

JUAN HATTING

and

THE STATE

CORAM:

RAMPAI, AJP *et* MONALEDI, AJ

JUDGMENT BY:

RAMPAI, AJP

HEARD ON:

14 OCTOBER 2013

DELIVERED ON:

19 DECEMBER 2013

- [1] The appellant was convicted on multiple counts of fraud, one count of theft and one count of money laundering. Following his conviction, on 27 September 2010 a custodial sentence was imposed on him. He was aggrieved by the sentence. He came on appeal before us with the leave of the court *a quo*.
- [2] The appellant was sentenced on his plea in the Bloemfontein Regional Court on 23 May 2011. He pleaded guilty to a total of 66 charges. Of those 64 were fraud charges. The remaining two charges, viz charge 65 and 66, concerned theft and money

laundering respectively. His written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 was handed in and marked exhibit “a”.

- [3] In the first place the appellant was sentenced in terms of section 276(1)(b) Act 51 of 1977 to a period of 10 year imprisonment in respect of the first count of fraud taken together with 31 other counts of fraud, to wit:

Charges: 2, 3, 4, 5, 6, 7, 15, 18, 19, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 55, 56, 58, 61, 63, 64.

- [4] In the second place the appellant was sentenced in terms of section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 to 10 years imprisonment in respect of the eighth count of fraud taken together with 31 other counts of fraud, namely:-

Charge 9, 10, 11, 12, 13, 14, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 48, 49, 50, 51, 52, 53, 54, 57, 59, 60, 62.

- [5] In the third place the appellant was sentenced in terms of section 276(1)(b) of Act 51 of 1977 to 6 years imprisonment in respect of charge 65, namely: - theft. The court *a quo* directed in terms of section 280(2) of Act 51 of 1977 that the appellant should serve the sentence concurrently with the sentence of 10 years imprisonment imposed in terms of section 276(1)(b) *supra*.

- [6] In the fourth place the appellant was sentenced in terms of section 4 Prevention of Organised Crime Act 121 of 1998 to 8 years imprisonment conditionally suspended for 3 years. The specific

condition was that the appellant should not be convicted of contravening section 1 and section 8 of Act 121 of 1998 during the period of suspension in respect of charge number 66, namely: money laundering.

- [7] Thus the appellant is to serve an effective term of 20 year imprisonment unless his current appeal against sentence succeeds.

- [8] Subsequent to the imposition of the sentence, the appellant successfully applied for leave to appeal against the sentences imposed on him in respect of the fraud charges only. He was granted leave to appeal on 3 August 2012.

- [9] The appellant, who was not legally represented on appeal, drafted and filed inordinately long and cumbersome heads of argument. He canvassed issues outside the narrow scope of his restricted parameters of his leave to appeal against the sentence as regards the fraud charges only. Accordingly this judgment will not exceed the bounds of the leave to appeal as granted by the court *a quo*.

- [10] The regional magistrate's approach to the question of sentencing mindful of the basic principle that punishment has to fit the criminal as well as the crime; that it has to be fair to society and that it has to be blended with a measure of mercy according to the circumstances – **S v Zinn** 1969 (2) SA 537 (A) at 540G-H and **S v Kumalo** 1973 SA 697 (A) at 698A (vide p 553:18 – p554:17 record).

- [11] In determining an appropriate sentence, the main purpose of sentencing must be constantly kept in the forefront of a trial judge's mind. The regional magistrate appreciated that a balanced sentence strives to attain the reformatory, preventative, deterrent and retributive objectives of punishment – **S v Rabie** 1975 (4) SA 855 (A) 862A. The protection of society is central to all those objectives. None of these objectives can be overlooked in the difficult search for an appropriate and balanced sentence. The regional magistrate was aware of this – vide p 622:10 – 623:10.
- [12] In **S v Rabie** *supra*, at 857D – E Holmes JA remarked that in every appeal against sentence the court hearing the appeal should be guided by the salient principle that punishment of an offender is pre-eminently a matter for the discretion of a trial court; that the court hearing the appeal should only interfere with the original sentence if the trial court has not judicially and properly exercised its sentencing discretion. The test, the court held, is always whether the sentence is vitiated by an irregularity or by a misdirection or by a disturbing degree of inappropriateness.
- [13] It is not every irregularity, misdirection or inappropriateness which vitiates the sentence and justifies appellate interference – **S v Pillay** 1977 (4) SA 531 (A). The irregularity, inappropriateness or misdirection complained of must be of such a material nature that a reasonable court hearing the appeal can conclude that the trial court did not judicially or properly exercised its sentencing

discretion. In **S v Pillay** *supra* at 535E-G Trollip JA aptly elucidates the disqualifying misdirection as follows:

“...it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum above: one that “the dictates of justice” clearly entitle the Appeal Court “to consider the sentence afresh”.”

The passage was quoted with approval by Olivier JA in **S v Jimenez** 2003 (1) SACR 507 (SCA) at para [13].

[14] In **S v Kibido** 1998 (2) SACR 213 (SCA) at 216g-i Olivier JA said:

“Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535A - B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (*supra*) at 684B - C; *S v Pillay* (*supra*) at 535E).”

- [15] The fraud charges referred to in para [4] *supra* attracted the prescribed minimum sentence of 15 years imprisonment in respect of a first offender by virtue of the fact that each of those charges were listed in Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 in that the actual or potential value involved in each charge of fraud was in excess of R500 000,00.
- [16] After a lengthy review of the caselaw dealing with the legal principles applicable to sentencing, the trial magistrate imposed an effective custodial sentence of 20 years on the appellant.
- [17] The question in the appeal was whether the aforesaid sentence was so disturbingly inappropriate or so materially erroneous or irregular that it virtually vitiated the sentencing discretion entrusted to the trial court – **S v Jimenez** *supra*.
- [18] On the one hand the appellant contended that the sentence imposed on him was exceedingly disproportionate to the crime(s) he committed. The thrust of his argument was that the trial court overlooked a strongly mitigating factor in his written statement. He contended that because the respondent had accepted his plea, the trial court was strictly confined to his plea. Yet the trial court, so he argued, went beyond the scope of his plea in sentencing him. That the trial court could not do. For this proposition he cited as his authority the decision of “The Reitz Four” in other words **S v Van der Merwe & Others** 2011 (2) SACR 509 (FB). By going beyond the scope of his plea, which plea the respondent had accepted, the appellant submitted that the trial court thereby

materially misdirected itself. Therefore, the appellant urged us to uphold his appeal, set aside the sentence and substitute it with a drastically reduced form of sentence commensurate to the loss of R2,0m which he admitted was involved in his fraudulent criminal enterprise and not R52,0m as alleged in the charge sheet.

[19] On the other hand, Ms Claassens, counsel for the respondent, sharply differed. Counsel contended that the regional magistrate followed the correct approach in that a great variety of factors was evaluated. Such a broad spectrum of relevant factors was not limited to the appellant's plea only but also included the evidence tendered by and on behalf of the respondents as well as the evidence tendered by the appellant himself. Ms Claassens submitted that, although precise details were lacking as to the exact amount of losses actually or potential suffered by the defrauded victims such as the banks and bridging finance enterprises, the regional magistrate came to the final conclusion that huge losses were suffered and experienced. Those losses were inherently hidden, albeit temporarily, in the credit risks, double bonds, lost interests, "buys-ins", additional costs, liquidation costs and procedures. She submitted, therefore, that the trial court committed no material misdirection. Accordingly counsel urged us to dismiss the appeal and to confirm the sentence.

[20] The trial court punished the appellant against the backdrop of the triad consisting of the personal circumstances of the appellant, the interests of the community as well as the magnitude, seriousness

and nature of the offences the appellant had committed – **S v Zinn** *supra*. To those cornerstones of sentencing I now turn.

- [21] In sentencing the appellant the trial magistrate took into account the personal circumstances of the appellant as an individual offender in conflict with the law. The appellant was 36 years of age. He matriculated from a good school, Grey College, in Bloemfontein. He studied law at the University of the Free State. He became an attorney by profession. He established his own law-firm. He also ventured out to try his luck in the property development sector of the economy.
- [22] He is a family man. He is a biological father of the 2 of the 4 children the couple has. He contributed towards the maintenance of his wife's 2 dependent minor children. At the time of his arrest, he was the sole breadwinner. He had a clean criminal record. He was incarcerated for 14 months before he was sentenced.
- [23] The appellant was a fugitive from justice for some time before he was arrested. However, he came back to his motherland on his own accord. He then freely surrendered himself to the police. He actively helped the police investigation team. He divulged other possible criminal activities. He gave back to the defrauded banks and to the liquidators various properties and thereby mitigated their financial losses to an extent. He and his wife have since been sequestered. He lost everything as a result of the sequestration. He could no longer sustain the opulent lifestyle. He could no

longer afford to contribute anything towards the maintenance of his family.

- [24] To rub salt into the wound, “The Law Society” successfully applied to have his awfully tarnished name struck off the roll of practising attorneys. His professional status was seriously dented and his social esteem drastically impaired. In short he was badly shamed.
- [25] He made a full disclosure of his entire fraudulent network of his criminal activities. Besides his assistance to the police he also voluntarily cooperated with the prosecution in the framing up of his indictment when there was no obligation on him to do so. He finally pleaded guilty to the 64 charges. The trial court accepted without any reservations, that the last four factors were strongly indicative of his genuine remorse. So much about the mitigating factors. In my view the appellant was adequately profiled and individualised by the trial court.
- [26] All the same I shall revert to his contention that he was not given adequate credit for what he described as the small amount of the loss the victims suffered as a result of his fraudulent enterprise.
- [27] In sentencing the appellant the trial court also took into account a range of aggravating factors, the nature and the seriousness of the offence(s). Four major banks in the country that suffered financial losses were Absa Bank, First National Bank, Nedbank and Standard Bank.

[28] The trial court commented as follows on the evidence given by the banks:

“It is difficult for the court because the various of factors to attach a sort of rands and cents figure to each bank’s losses at this stage. A number of the property repossessed by the bank has not yet been disposed of by the. One must at this point in all fairness speculate as to the stability of the property market in years to come in order to determine if there would be a profit or a loss made by these institutions.”

[29] Two significant things emerge from the foregoing passage in particular and upon careful reading of the sentencing component of the judgment in general. The first is that the trial court did not blindly and unquestioningly accept the evidence given by the bank witnesses concerning the financial losses merely because the respondent tendered it against the appellant. The second is that the trial court interrogated the evidence by the bank witnesses in order to have a broadly informed understanding of the adverse financial impact of the appellant’s widespread fraudulent scheme.

[30] The underlying idea as to why such evidence was tendered by the bank witnesses themselves, was not to ascertain the mathematically precise quantum of the actual or potential losses suffered by the banks. The evidence was primarily tendered for the purpose of assisting the trial magistrate to have a proper perspective of the magnitude of the moral blameworthiness of the appellant’s deceptive, pervasive and criminal enterprise.

- [31] The trial court found that at the time of sentencing, none of the banks themselves was in a position to precisely determine its final losses. Moreover, even the liquidators were still a long way from finalising the liquidation and the sequestration processes.

I am of the view that the trial court followed the correct approach. It evaluated the evidence of the bank representatives on a broad spectrum of relevant factors. Having done so, the trial court came to the final conclusion that the huge losses were experienced by all the victims of the appellant's self-enrichment fraudulent scheme. In that process the trial court correctly made no attempt to quantify the exact amounts of the losses suffered by the appellant's victims. Anyhow, the trial court was not called upon to do so.

- [32] The trial court quite correctly found that the appellant had exposed the banks to great risk on account of his fraudulent activities. The trial court correctly rejected the appellant's contention that the banks and the liquidators were to blame for the magnitude of their losses. On the contrary the trial court found, and again correctly so in my view, that the appellant "was the architect of this entire situation". Like the banks, the providers of the bridging finance also suffered significantly substantial financial losses as would more fully appear from the particulars of the last 6 charges.

- [33] The appellant, an attorney by profession, did the very opposite of what one would come to expect from a member of such an honourable profession. In **S v Guntenhöner** 1990 (1) SACR 642 (W) at 648c Gordon AJ had this to say about breach of trust.

“However, clothed with the powers that he did have, he performed work of importance and he undoubtedly occupied a position of trust.

For a banker to take advantage of these important powers and to betray this trust placed in him so as to steal R47 million or so from his bank must be viewed in a most serious light.”

[34] The embezzlement or misappropriation or theft of trust money, especially by an attorney, is seen in a very serious light. The appellant was, by virtue of his vocation, intrinsically linked to several positions of trust in relation to the various banks, bridging financial enterprises and many more other victims all of whom were his loyal clients. Needless to say he woefully took an unfair advantage of his unsuspecting and trusting clients by the abuse of the powers and inside knowledge he had of the affairs of his clients. He betrayed the trust they had in him. He tarnished the image of the attorney’s profession.

[35] His position of trust in relation to each and every bank he defrauded was twofold. First and foremost he was a trusted attorney specialising in conveyancing on the one hand. Secondly he was a trusted bank official on the other hand. As regards his private clients, he abused his position of trust by looting their trust account(s) – charge 65. He was also in a trust relationship with the governing body of the profession. Such professional relationship is governed by the Attorneys Admission Act 53 of 1979 as amended. Se preamble to the charge-sheet – p58A:01:16.

- [36] He unwisely tried to trivialise or down-play his powerful position of trust he had with the banks. That, in my view, was not only indicative of his complete disregard and disrespect for the trust the banks had in him and betrayal of his profession but it was also indicative of the lack of genuine remorse. This symbolised his unrepentant stance. Such a stance was telling against him. An offender, who shifts blame to his victims, lacks insight into his wrongs. An offender who demonstrates such unwillingness to accept full responsibility for the consequences of his unlawful actions cannot be regarded as a suitable and rehabilitable candidate in the foreseeable future. See exhibit “b”, p644, exhibit “c” and exhibit “f” p709.
- [37] The first 65 charges all come together as one in the last charge, charge 66 – money laundering. The appellant deceitfully used the trust account of his law-firm as a vehicle for the laundering of the fraudulently acquired funds or proceeds of organised criminal activities.
- [38] The integrity of the appellant’s trust account was drastically compromised and the credibility of his profession put into serious disrepute. Living it up was cool but he may never rise up again. The fraudulent scheme was not a simple delinquent schoolboy’s stuff. It was rather an intricate plan, cleverly thought out. Therefore the finding of the trial court that those multiple offences of fraud were meticulously premeditated is one which I support without any reservation.

- [39] The appellant was on the panels of all the four prestigious banks in the land. He was *au fait* with the inner procedures, practices, systems and workings relative to homeloans. He exploited the institutional weaknesses for personal gain. An attorney worth his salt would have tightened the loose ends in the system to protect the interests of his clients. He was the architect of this well devised plan to defraud, among other victims, the banks, the bridging finance enterprises and the members of society who had entrusted their affairs to him.
- [40] He cunningly schemed and greedily wove a web of deceit by recruiting and drawing in friends and relatives to expand his empire of fraud. The practical execution of the fraudulent enterprise, as evidenced by the double bonds underlined thorough premeditation and in-depth knowledge. The planning went further than amassing wealth by stealth and organised collaborative ventures. It included how he would escape the police should his crimes be exposed. He acquired a false passport in advance by fraudulent means so he could immediately go on the run to enjoy the fruit of his ill-gotten gains.
- [41] There could be no doubt that the appellant was induced to defraud by sheer greed and not real need to defraud the victims of their money. He had a burning desire to accumulate wealth by hooks or crooks not only as an attorney but also as a property developer. He chose to feather his nest and to cushion his lifestyle with proceeds of organised crime. He sought to mitigate the damage occasioned by his unlawful and deplorable actions by blaming the

thieves or thief who allegedly once stole money from him. He can tell that story to the birds. He simply needed to be reminded of the old adage that:

“Two wrongs can never make a right.”

[42] He resorted to criminal activity to fix a purely personal financial loss by stealing from the innocent victims who had nothing to do with his alleged financial loss. He certainly knew that there were ethically and legally permissible avenues to follow. As a lawyer, the appellant knew it very well.

[43] The appellant committed a series of fraudulent misdeeds over a prolonged period of no less than four years. He made no attempt whatsoever during that period to desist, on his own accord, from his widespread criminal activities. Indeed he had an unblemished criminal record. Although he was a first offender, it must be borne in mind and held against him that he defrauded his victims not once or twice or so but repeatedly on 64 different occasions over an inordinately long period of time, 48 months.

“He could, at any time during the course of that period, have desisted from his conduct but he failed to do so and in fact may well have continued with his scheme but for the fact that he was 'found out'.”

See **S v Landau** 2000 (2) SACR 673 (W) at 677d-e per Kuny AJ. Moreover it did not end there. He went a step further. He defrauded, stole and laundered the ill-gotten proceeds of his crimes. This is the first thing. Let us shelve it for the time being.

[44] The appellant then took to flight. He fled the country. He evaded the law for twelve months. He only surrendered himself when he reckoned the situation was idyllic for him. As a fugitive heavily but handsomely loaded with money he probably lived a stylish and high life of luxury abroad. All that he sustained at the expense of his defrauded victims. There can be no doubt that the overseas expenses could have mitigated the loss suffered by the victims. This is the second point. Let us also shelve it for a while.

[45] The appellant constantly and shamelessly tried to shift the blame to his victims, particularly the banks. He thereby tried to extenuate the moral blameworthiness of his own unlawful actions. The trial court rejected his version. It found that he was the mastermind of his own demise. I could not agree more with the finding. He cannot extricate himself from this furnace of crime by unfairly vilifying the victims of his criminal enterprise. None of them was to blame. He made his bed and so he must lie on it. This is the third point.

[46] When the appellant's alleged remorse is considered against the backdrop of the aforesaid three factors, then his contention that he was remorseful evaporates into thin air. Those factors were indicative of his remorselessness and nothing less. See **S v Seegers** 1970 (2) SA 506 (A) at 511G-H where Rumpff remarked:

“Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order

to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.”

See also **S v Matyityi** 2011 (1) SACR 40 (SCA) at para [13] where Ponnan JA aptly described remorse as a gnawing pain of an offenders’ conscience for the plight of another. I could not discern that kind of remorse here.

- [47] The appellant has been convicted of very serious crimes. Worst still, those crimes were very prevalent. The appellant’s case itself demonstrated the prevalence of the crime of fraud. His fraudulent actions had an adverse impact on the interest of the lawyering community in general and the conveyancing sector of the legal profession in particular. The banks had to review their selection criteria. They revised their procedures, practices and systems concerning appointment of attorneys to their panels. The stringent measures subsequently implemented by the banks regrettably closed doors of opportunities to many deserving attorneys. The appellant has to shoulder the blame for that harmful state of affairs.
- [48] In my view the deterrent and the retributive elements of sentence surged forward very strongly in this matter. The personal circumstances of the appellant together with the mitigating factors were substantially eclipsed by the strong tide of the aggravating factors. The magnitude, the multiplicity, the nature and the seriousness of the fraud which attracted the sentencing regime in terms of section 51(3)(a) as well as the impaired interests of

society dictated that the appellant be deterrently and retributively punished.

- [49] Indeed it is not the function of a court to break an offender and to sacrifice him on the proverbial altar of retribution or deterrence. The trial court demonstrably steered away from such a course. Nonetheless it remains a salient principle, well established, recognised and applied in our law that:

“The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.”

S v Lister 1993 (2) SACR 228 (A) at 232g-h per Nienaber JA. The passage was quoted with approval by Olivier JA in **S v Jimenez** *supra*, at 522f.

- [50] The trial court was at pains in search for an appropriate sentence. In a detailed and meticulous manner, the trial magistrate, Ms D. M. Soomaroo, carefully considered the two sides of the coin. She patiently went out of her way to afford the appellant ample opportunity. Although the appellant was legally represented by an experienced and seasoned counsel she allowed him not only to give evidence in mitigation but also to present what, for lack of better terms, I may call supplementary closing address. Such extra-ordinary measures showed that the trial magistrate patiently

listened to the appellant's plea in mitigation and painstakingly considered all factors favourable to him as an offender and thus thoroughly individualised him.

[51] All these peculiar pre-sentencing features objectively suggested that the seriousness, the prevalence, the multiplicity and the magnitude of the offences and the adverse impact of those offences on the general interest of society were not improperly considered in a vacuum but rather properly against the backdrop of the appellant's adequately profiled person. It appeared to me, in the light of the admirable way in which the sentencing proceedings were conducted, that the appellant was sentenced in a balanced manner.

[52] The sentence imposed on the appellant was indeed stiff. That notwithstanding, I am not persuaded that the sentence of 20 years imprisonment was disproportionate to the multiple, serious and prevalent offences we had to grapple with in the appeal. The societal interest coupled with those rife crimes dictated nothing less.

Although the custodial term may, at a glance, appear to be on the heavy side of the sentencing scale, it has to be readily appreciated that the prescribed minimum sentence applicable to each of the 32 section 51(3)(a) convictions has already been substantially tempered with mercy. I shall demonstrate in the next paragraph, the merciful features of the sentence imposed on the appellant.

[53] Firstly, the trial court found that substantial and compelling circumstances existed to justify a lesser sentence than the prescribed minimum sentence. As a result of such a finding the court *a quo* deviated to the extent of 5 years imprisonment in respect of each of the 32 offences. The appellant was thus sentenced to 10 years imprisonment instead of 15 years imprisonment in respect of each of those offences.

Secondly, all the 32 fraud charges which attracted the prescribed minimum sentence of 15 years imprisonment were, without any exception, taken together as one for the purpose of sentencing the appellant.

Thirdly, the 6 year imprisonment sentence imposed on the appellant in connection with the charge of theft will be concurrently served with the composite sentence of 10 years imprisonment imposed in terms of section 276(1) on the appellant in connection with the 32 charges of fraud in respect of which there was no prescribed minimum sentence.

Fourthly, the sentence of 8 year imprisonment imposed on the appellant in connection with the charge of money laundering was conditionally but wholly suspended.

[54] I am persuaded by Ms Claassens's submission that the trial court did not materially misdirect itself as alleged or on any other ground whatsoever. In the absence of any proven material misdirection,

no appellate interference is warranted. That being the case, I am inclined to dismiss the appeal.

[55] I now turn back to the substratum of the appellant's appeal. The crux of his contention was that, in sentencing him, the trial images disregarded a strongly mitigating factor. That factor concerned his admission, which the respondent accepted, to the effect that the composite potential loss suffered by the victims was no more than R2,0m. That amount was tens of million rand less than the loss as originally stated in the charge sheet.

[56] I hasten to point out that the facts in the instant appeal are distinguishable from those in the appeal of **S v Van der Merwe & Others** *supra*. In that case there was virtually no evidence before the trial magistrate other than the joint statement the accused had made in terms of section 112(2) Act 51 of 1977. The position was completely different in the instant matter. Besides the appellant written plea of guilty in terms of section 112(2), the appellant also orally testified. In addition to that the respondent led the evidence of four witnesses who testified on behalf of the banks. Therefore the *ratio decidendi* in **S v Van der Merwe**'s case does not apply here. The trial court was not strictly confined to the appellant's written plea in determining an appropriate punishment.

[57] In the exercise of its function the trial court had a wide two-fold discretion in deciding, firstly which factors should be allowed to influence it in determining the measure of punishment, and

secondly in determining the value to attach to each factor taken into account – **S v Kibido** *supra*.

- [58] It seemed to me that the trial court carefully considered all the facts including those on which the appellant pleaded. The written plea encompassed all the facts and details as per the charge sheet. It covered all the charges per the charge sheet. It covered all the charges. It included the purchase price as per column 5 and 12 as well as the interest rate in column 6 and 13 of annexure “a”. The appellant’s plea also included the amounts as per column 7 of annexure “b”.
- [59] The appellant has made a huge issue of para 8 of his plea which he called his “method of calculation”. On his own say-so that would represent the potential loss the banks stood to suffer. It follows, therefore that the appellant himself was not in position to calculate the precise loss – actual or potential. His method of calculation could not be considered in isolation. It had to be broadly considered in line with the entire plea and the rest of the evidence in aggravation of sentence.
- [60] The potential loss on which the appellant so heavily but selectively relied, was exactly that: an imprecise potential which the appellant himself could not accurately calculate. The bankers were called for the purpose of giving evidence in an effort to determine extent of the appellant’s moral blameworthiness by indicating whenever practically possible what the actual losses were or what the potential losses could be.

[61] The amounts of the initial bonds were not affected by the appellant's plea since those amounts and the charges of fraud were housed in the contracts. The appellant's plea covered the amounts as specified in each contract – item 7.2 annexure “a”. Accordingly the provisions of section 51(2) Act 105 of 1997 applied to each of those contract amounts.

[62] Where a particular property had since been sold, the sale was depicted and the proceeds thereof taken into account in assessing the loss. Where a given property still remained unsold, that fact was also taken into account. An estimation was made and a projection was forecast of what the banks might reasonably expect given the current trends in the property market. The bank also took into account the interest to which they were entitled and the payments made by the appellant – exhibit “e”, “g”, “i” and “j”. In respect of the double bonds, the losses to the banks were actual total losses. These were unsecured loans for which the value of the property could not be utilised – vide 9.1 and 9.3 exhibit “a”.

[63] In my view there was no substance in the appellant's contention. Such contention was correctly rejected by the trial court. Therefore, I am inclined to dismiss the appeal.

[64] In the result I propose the following order:

64.1 The conviction stands unchallenged.

64.2 The appeal against the sentence is dismissed.

p.p._____
M. H. RAMPAL, AJP

I concur and it is so ordered.

p.p._____
S. R. MONALEDI, AJ

On behalf of the appellant: Mr. J. Hattingh
The Appellant
Acting in *persona*

On behalf of the respondent: Adv. B. G. Claassens
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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